

**THE EASTERN CARIBBEAN SUPREME COURT
SAINT VINCENT AND THE GRENADINES**

IN THE HIGH COURT OF JUSTICE

SVGHCV2018/0086

**IN THE MATTER OF AN APPLICATION FOR INTERIM INJUNCTION PURSUANT TO PART 17.1 (A) (B)
OF THE CIVIL PROCEDURE RULES 2000**

AND

**IN THE MATTER OF A MATTER FOR JUDICIAL REVIEW OF A DECISION BY THE PERMANENT
SECRETARY OF MINISTRY OF SECURITY TO TRANSFER JAMALI WHYTE FROM THE INLAND
REVENUE DEPARTMENT IN THE MINISTRY OF FINANCE TO THE MARITIME ADMINISTRATIVE
OFFICE IN THE MINISTRY OF SECURITY**

BETWEEN:

THE PUBLIC SERVICE UNION

CLAIMANT

AND

PERMANENT SECRETARY OF MINISTRY OF NATIONAL SECURITY

FIRST DEFENDANT

THE CHIEF PERSONNEL OFFICER

SECOND DEFENDANT

PUBLIC SERVICE COMMISSION

THIRD DEFENDANT

Before:

The Hon. Mde. Justice Esco L. Henry

High Court Judge

Appearances:

Mr. Jomo Thomas with him Ms. Shirlan Barnwell for the claimant.

Mr. Duane Daniel with him Mr. Kezron Walters for the defendants.

2019: Jan. 23

Jul. 18

Sept. 26

2020: Feb. 13

Apr. 6

JUDGMENT

BACKGROUND

- [1] **Henry, J.:** This claim is made by the Public Service Union ('PSU' or 'the Union') of Saint Vincent and the Grenadines on behalf of one of its members - Mr. Jamali Whyte. The PSU is a trade union that represents public officers who are employed by the Government of Saint Vincent and the Grenadines. It claims that Mr. Whyte has been subjected to unfair, unreasonable and unlawful conduct by his administrative heads within the Ministry in which he serves. The PSU has brought this claim to vindicate what it contends are violations of Mr. Whyte's rights to due process.
- [2] Mr. Jamali Whyte is a junior clerk in the Inland Revenue Department ('IRD') of the Government of Saint Vincent and the Grenadines on the Grenadine island of Union Island. In April 2018, the Permanent Secretary ('PS') in the Ministry of National Security¹ Mr. Godfred Pompey, summoned Mr. Whyte to mainland Saint Vincent and the Grenadines where he was directed to immediately proceed on 8 days' vacation leave and also notified in writing and verbally that he was being transferred to the Maritime Department, Cruise Ship terminal on mainland Saint Vincent at the expiration of the leave.
- [3] The PSU claimed that Mr. Whyte was not supplied with reasons for the directive that he proceed on compulsory leave or for the transfer. Mr. Whyte and the PSU are aggrieved by those decisions. Among their complaints is that a transfer or re-assignment to an office on the mainland would disrupt his family life and require that he incur extraordinary living expenses which would be unsustainable. The Union wrote unsuccessfully to the Public Service Commission ('PSC') and the Chief Personnel Officer ('CPO') seeking audience to make representations on Mr. Whyte's behalf. The PSU has filed this fixed date claim form² against the PS, the CPO and the PSC³.
- [4] The PSU contended that the decisions to transfer Mr. Whyte to the Maritime Department and to compel the PSU to take compulsory leave are unlawful and unfair. They asserted that the decision

¹ His full title is Permanent Secretary in the Ministry of National Security, Air and Sea Ports Development with Responsibility for Grenadines Administration, Kingstown.

² By Fixed Date Claim Form filed on July 12th 2018.

³ Referred to collectively as 'the defendants'.

to transfer him is unreasonable and failed to consider relevant matters. They have sought declarations to such effect and an order of certiorari to quash the transfer directive. They contended that the PSC and the CPO acted unlawfully, unjustly and unfairly by not affording Mr. Whyte an opportunity to be heard. They seek a declaration that the CPO acted unlawfully and procedurally improper by failing or refusing to state the public interest basis for forcing the claimant⁴ on compulsory leave.

- [5] The defendants resisted the claim. They submitted that it is without merit. They argued that there is no legal requirement for the PS to give a reason for his decisions; that his decisions are not otherwise illegal or unreasonable or based on irrelevant considerations. They submitted that the decisions made by the CPO and PSC are not invalidated by unlawfulness or procedural irregularity. I have found that the defendants' decisions and conduct were in some respects improper, unfair and/or unlawful.

ISSUES

- [6] The issues are whether:

1. The decisions made by the PS to:
 - a) transfer or re-assign Mr. Whyte to the Maritime Department on the mainland; or
 - b) proceed on 8 days' vacation leave;failed to have regard to relevant considerations, were arrived at in a procedurally improper manner; are unreasonable or unlawful?
2. The decision by the CPO and PSC respectively not to afford Mr. Whyte an opportunity to be heard was unlawful, unjust and/or unfair; or
3. The PSC acted unlawfully or procedurally improper by failing or refusing to state the public interest basis for forcing the claimant on compulsory leave? and
4. To what, remedies if any, is the claimant entitled?

⁴ The named claimant is the PSU. . Presumably, they intended Jamali Whyte. They have not made an application to amend the pleadings to reflect this.

LAW AND ANALYSIS

Issue 1 – Whether the Permanent Secretary’s decision to transfer or re-assign Mr. Whyte to the Maritime Department; or instruct him to proceed on 8 days’ vacation leave failed to have regard to relevant considerations, were arrived at in a procedurally improper manner, are unreasonable or unlawful?

- [7] This judicial review claim arises from an order of court dated June 27th 2018 granting the PSU leave to apply for judicial review of the referenced decisions. One of the factual assertions made by the PSU at the application stage was that its member Mr. Jamali Whyte was transferred from his post in the Ministry of Finance by the PS in the Ministry of National Security. The PSU has since conceded⁵ that Mr. Whyte has at all material times been employed in the Ministry of National Security and therefore falls under the portfolio and supervision of the PS in that Ministry. It contended that the erroneous information was supplied inadvertently and was not intended to mislead.
- [8] The PSU relied on the testimony of Mr. Jamaili Whyte, Mr. Phillip Bailey and Mr. Elroy Boucher. Mr. Whyte was its principal witness. He asserted that he has been employed as junior clerk, at the Revenue Office on Union Island for the past 11 years. He averred that on April 24th 2018 his immediate supervisor handed him her phone to take a call from the PS National Security, Mr. Godfred Pompey. In the ensuing conversation, Mr. Pompey directed Mr. Whyte to report to his office on mainland Saint Vincent before Friday, April 27th 2018. Mr. Whyte opined that he found it strange to have received such a call since it was the first time he had been contacted by the PS in that way.
- [9] He spoke with the PSU’s first Vice President and the following day travelled to Saint Vincent to meet the PS. He stated that he paid \$280.00 for his return flight, assuming that he would be reimbursed pursuant to provisions of the Civil Service Orders (‘CSO’). He went to the meeting as directed, where the PS told him to proceed on 8 days’ vacation immediately, and to report to the Maritime Department, Kingstown at the end of the vacation leave. Mr. Whyte averred that he was flabbergasted and asked the PS for the reasons for such an abrupt and life disrupting decision.

⁵ As outlined in affidavits of Mr. Jamali Whyte filed on 12th July 2018 and 19th October 2018 respectively.

- [10] He recalled that the PS replied, 'Based on the information I received about your attitude and behaviour at work, along with activities you are involved in, in Union Island. I can no longer have you working at the Union Island Revenue office.' Mr. Whyte claimed that Mr. Pompey did not elaborate even though he sought an explanation.
- [11] Mr. Pompey gave him a letter at the end of the meeting. He produced the letter. The material parts stated:
- 'Further to our conversation on Wednesday 25th April, 2018 requesting that you proceed on vacation leave with effect from 25th April, 2018 or eight (8) days re CSO 6.2 (a) Leave (sic)
- You are further directed to report for duty at the Maritime Department, Cruise Ship Terminal with effect from 8th May, 2018 on completion of your vacation leave. This re-assignment will continue until further notice.'
- [12] Mr. Whyte noted that the letter provided no reason for his transfer/re-assignment and did not indicate how long he would be stationed at the Maritime Department. He and the PSU contended that he did not know what factors Mr. Pompey took into account in making the decision to transfer him and that none were not set out in the letter. He asserted that he had not applied for leave, a transfer, or re-assignment to the mainland. He averred that he was mindful that a transfer from Union Island to the mainland would cause serious disruption of his family life and that he could not afford to live there.
- [13] He chronicled that he was born and raised in Union Island, completed his primary and secondary schooling there, has always lived there and is currently in a long term cohabiting relationship which has produced a son, who is 3 years old. He averred that he and his common law wife share equally the daily parental responsibilities of caring for and raising their son. He claimed that he gets his son ready for school each day, takes him to and from school, has lunch with him and takes care of him until his mother gets home at 5.30 p.m. He averred that his partner and he are pursuing long distance degree programmes online and allocate their respective study times around caring for their son.
- [14] Mr. Whyte averred that he has been integrally involved in his son's life since birth and that they are very much attached to each other. He attested that no amount of money could remedy the

disruptive effect that a transfer to the mainland would have on his family life. He remarked that it would tear his family apart.

[15] He indicated that within two days of his 'forced vacation leave' he became worried and stressed and after seeking medical attention for diabetes related issues, he was placed on 30 days' sick leave by his doctor. He stated that he attempted to submit his sick leave certificate to his supervisor on May 7th 2018 around 9.00 a.m. but learnt that she was not at work yet. He testified that he returned an hour later and finding that she was still not there, he left the document with a co-worker. He said that sometime later the co-worker telephoned him telling him to return for the sick leave certificate because the supervisor had refused to accept it.

[16] According to Mr. Whyte, he did not return the same day because he was feeling unwell. He explained that he went to collect it 4 days later and that day wrote to the PS to notify him that he had tried to submit it to his supervisor Mrs. Selby Adams without success. He said that he transmitted the sick leave certificate to the PSU by mail and asked them to forward it to the PS.

[17] He stated that he wrote to the PSC on April 26th 2018 outlining what had transpired, the decision taken by the PS, his objections to the decision, indicating that no reasons had been given for the decision and setting out the reasons why it would be difficult for him to live on the mainland. He said that he has not received a response to that letter. He stated that the PSU also wrote to the PSC by letter dated April 30th 2018 requesting an urgent meeting to address the PS' decision. He averred that that letter has also remained unanswered. Mr. Whyte testified that a similar letter was issued by the PSU to the PS on May 4th 2018 seeking an audience to address his (PS') decision as set out in his April 25th 2018 letter. Mr. Whyte averred that that letter has also not been answered. In similar vein, he testified that the PSC has failed to respond to a letter from the PSU's attorneys dated May 14th 2018 to engage the PSC's chairman regarding the decision to transfer him. Mr. Whyte asserted that the PS, the PSC and the CPO have all refused to respond to the PSU on this matter.

[18] Mr. Whyte explained that only two boats travel between Union Island and the mainland and they are cargo boats; and that neither makes the journey on a daily basis. He stated that one makes the trip twice weekly while the other does not have a consistent schedule. He testified that if he had to

travel to the mainland each day he would need to take a plane at a daily cost of \$270.00 and a monthly cost of \$5400.00. He indicated that nothing has been said to him about travel expenses related to working on the mainland. These figures have not been disputed by the PS, the CPO or the PSC. They have not refuted Mr. Whyte's assertions that he has been told nothing about how such travel related expenses are likely to be met.

- [19] Mr. Whyte outlined his income and expenditure. They have not been disputed. He earns a gross salary of \$1896.00. He claims that his monthly expenses total \$1889.64 and include payments for student loan, car note, medical insurance, house insurance, consumer loan, household expenses and income tax. He remarked that based on his present obligations, his salary is insufficient to cover daily travel from Union Island to the mainland. He stated that he has no desire to live and work away from Union Island because his family and financial circumstances do not allow him to do so at present.
- [20] He claimed that it is not the PS', the CPO's or the PSC's usual practice to transfer public officers to the mainland from the Grenadines, unless the officer makes a request for such transfer or is being promoted. He described his transfer as an anomaly. He observed that when a public officer is transferred from the mainland to the Grenadines, such an officer is granted a 'hard area' allowance, however a transfer from the Grenadines to the mainland does not attract such an allowance. He remarked that not being provided with a hard area allowance for a transfer to the mainland is understandable since the CSO makes no such provision, and because the mainland is not considered to be a hard area.
- [21] Mr. Whyte opined that his transfer seems arbitrary. He complained that he was not given a hearing by the PS, the CPO or the PSC and is at a loss as to why the PS made the decision; and why the PSC has not responded to his letter. He asserted that he considers the transfer to be a heavy handed punishment for some wrong that he has not committed. He averred that no disciplinary charges have been brought against him. He stated that he has not been given a warning letter accusing him of a breach of any CSO. He recalled that by letter dated 18th November 2015, his supervisor stated that he had refused to sign the attendance register. He pointed out that he wrote the PS a letter dated 24th November 2015 denying those allegations.

- [22] The PSU's General Secretary Mr. Philip Bailey confirmed that he sent a letter to the CPO on 28th April 2018 on Mr. Whyte's behalf. He stated that he authorized the Secretary Ms. Joan Williams to sign it on his behalf. Mr. Bailey also indicated that he authored a letter to the PS, dated 4th May 2018 to address matters related to Mr. Whyte. He said the PSU has not received a response to either letter.
- [23] Mr. Bailey averred that he could not recall a situation where an officer (other than Jamali Whyte) from the Grenadines was transferred to the mainland within recent times. He noted that officers are at times transferred to the Grenadines from the mainland and in such cases receive a hard area allowance and are accommodated at the State's expense.
- [24] Mr. Pompey testified that the letter dated April 25th 2018 refers to re-assignment and is to be read as a transfer within the meaning of CSO orders 2.16 and 2.17. Those provisions state respectively:

'Liability to transfer of

2.16 Officers are liable to transfer any (sic) post of equivalent grade in the State.

Transfers

2.17 (1) Subject to the provision of paragraph (2) of this order a transfer not involving a change in emoluments of an officer, or the nomenclature of his post may where the transfer-

- (a) is within a Ministry or between a Ministry and any Department of the Ministry,
be made by the Permanent Secretary;
- (b) is within a Department, be made by the Head of that Department or the Permanent Secretary of the Ministry responsible for that Department;
- (c) is between Ministries or between Departments of different Ministries be made by the Chief Personnel Officer after consultation with the Permanent secretaries concerned;

Provided that all transfers ordered under (a) and (b) above shall be reported forthwith to the Chief Personnel Officer.

(2) Where an officer is, or is to be transferred under any of the forgoing (sic) provisions of this order, a Permanent Secretary, or Head of Department, or the officer concerned (through the Permanent Secretary or Head of Department) may lodge a

written objection with the Chief Personnel Officer; and if the objection is lodged by an officer it shall be transmitted to the Service commissions.' (bold added)

- [25] Mr. Pompey and the CPO Mrs. Arlene Regisford Sam attested that a PS is empowered by order 2.17 (1) to transfer an officer within a Ministry to any post of an equivalent grade. They asserted that Mr. Whyte was being transferred from the post of Clerk/Typist at Grade K of programme 406 in Summary of Programmes of the Saint Vincent and the Grenadines Estimates of Revenue and Expenditure for the 2018 year. The PS averred that it is an equivalent grade within the same Ministry, as contemplated by CSO 2.16 and attracted the same emoluments. The CPO confirmed that she was notified of Mr. Whyte's re-assignment as stipulated in order 2.17 (1) of the CSO.
- [26] Mr. Pompey stated that such a transfer can be effected by the PS. He and the CPO asserted that he was therefore entitled to make the transfer in accordance with CSO 2.16, 2.17 and paragraph 3 (2) of the Public Service Regulations, made under the Constitution. This is a correct interpretation of those provisions.
- [27] Mr. Pompey explained that in March 2018 he met with high ranking members of the Royal Saint Vincent and the Grenadines Police Force, during which he received certain sensitive information regarding Mr. Whyte. He testified that as a result he began to discreetly monitor Mr. Whyte's activities through his immediate supervisor. He averred that within a few weeks of the referenced meeting he received a report from the Police and Customs about an incident involving Mr. Whyte.
- [28] He indicated that based on reports received from two separate sources over a very short span of time, he thought it prudent and best to transfer/re-assign Mr. Whyte from Union Island to the Maritime Administration pending the outcome of investigations; and to seek guidance from the CPO on appropriate action.
- [29] Mr. Pompey explained that he also had the benefit of Mr. Whyte's personnel file from the CPO on which there are various reports regarding several instances of misconduct by Mr. Whyte, from his Supervisor Mrs. Selby-Adams, the PS and the CPO. He did not claim to have relied on any of those matters as a basis for the transfer. I make no finding that he did. He testified that on the 24th day of April 2018 he called Mrs. Sherma Selby-Adams, the District Officer in the Union Island

Revenue Office, under the Ministry of National Security and discussed with her certain matters pertaining to Mr. Whyte's conduct after which he asked to speak with him, spoke with him and asked him to present himself to his (the PS's) office before the end of that week to discuss the matter.

- [30] Mr. Pompey acknowledged that Mr. Whyte visited his office the following day at which time he held discussions with him, and indicated that his conduct and the activities, in which it was alleged he was engaged, if true, were not in keeping with that of a public officer at the Union Island Revenue Office. Mr. Pompey did not indicate why he considered it necessary to have Mr. Whyte travel from Union Island for that purpose. No one else did. He stated that he was constrained to give any further details to Mr. Whyte because the information he had was that there was an on-going investigation by the Police and Customs into his conduct and activities, and he did not want to prejudice those investigations, or wish that Mr. Whyte suffer any financial and pecuniary disadvantage under the circumstances.
- [31] Mr. Pompey asserted that the re-assignment to an equivalent post with the same emoluments and title appeared to serve the best interest of all parties concerned. He testified that there was no other suitable position in Union Island under his control to which Mr. Whyte could have been transferred or assigned, which would not conflict with the alleged activities reported to him by the various authorities. He averred that the personal circumstances to which Mr. Whyte speaks in his affidavit were not brought to his attention before he issued the April 25th 2018 letter. It is not clear whether Mr. Pompey made inquiries. He did not say. In light of his statement that he was unaware of them before he issued the letter, it appears that he did not. I infer that he did not.
- [32] Mrs. Regisford Sam testified that it is usual practice where an officer is re-assigned within a Ministry, that he continues to hold the post which he held in the post just vacated. She explained that a letter of re-assignment need not, and often would not, indicate a position to which an officer is transferred. The CPO exhibited two copies of Staffing Arrangements Memoranda which she said demonstrate that all assigned officers keep their original positions, while for officers transferred, the posts to which they are transferred are stated.

- [33] She recalled receiving a telephone call from Mr. Pompey on 24th day of April 2018, and on the following day, a copy of the letter to Mr. Whyte from the PS advising of his re-assignment to the Maritime Administration. She acknowledged that two days later the Service Commissions Department received an application for seven (7) days' vacation leave from Mr. Whyte, for the period 25th day April 2018 to 4th day May 2018.
- [34] Mr. Pompey stated that the decision to grant leave and subsequently transfer/re-assign Mr. Whyte was not arbitrary. He said that he had the benefit of several official reports which give testament to the on-going investigation and as a result he concluded that it was in the best interests of the Revenue Office and for the exigencies of the Public Service to transfer/re-assign Mr. White to the Maritime Department in an equivalent capacity to the one which he currently holds, until the conclusion of the investigations. He recalled that during their conversation, Mr. Whyte was asked to proceed on eight (8) days' vacation leave following which he would be re-assigned to the Maritime Department from 8th day of May 2018.
- [35] Mr. Pompey stated 'a sick leave request was received for thirty (30) days with effect from May 07, 2018 to June 06, 2018.' The CPO confirmed receipt of the medical certificate. Mr. Pompey testified that on June 6, 2018, the application for leave to apply for judicial review was filed in this matter. He stated that Mr. Whyte reported for duty to the Maritime Department on June 12, 2018 and then applied for vacation. He asserted that in his estimation, Mr. Whyte's transfer/re-assignment was properly effected and done within the best interests of the Union Island Revenue Office, the exigencies of the public service and the people of Saint Vincent and the Grenadines.
- [36] Mrs. Regisford Sam indicated that where a public officer is transferred or re-assigned to an office on mainland Saint Vincent from the Grenadines no hard area allowance or any other allowance is given. She indicated that she was informed and believed that the hard area allowance is given to police officers who are transferred from an area where access to public utilities is great, to one where there may not be such easy access, for example from Kingstown to Fancy. She did not state who informed her of this. This part of her testimony is therefore disregarded as not being probative.

[37] The CPO noted that the CSO order 5.26 (e) provides:

‘Officers stationed in areas designated ‘hard area’ will be eligible to receive a compensatory non-pensionable allowance at rates laid down by the Minister of Finance. The allowance may continue to be paid to an officer on sick leave or annual leave but not during vacation leave.’

[38] Corporal of Police #132 Dawnette Alexander gave evidence that she was on duty at the station in Union Island when an incident occurred on the 21st day of April 2018. She testified that as a result, investigations were commenced and the name ‘Jamali Whyte’ surfaced as a possible person of interest. She indicated that she is aware that the Customs and Excise Department is working along with the Royal St. Vincent and the Grenadines Police Force to conduct further investigations into the matter. Under cross-examination she stated that she was one of the investigators and that Mr. Whyte went to the Union Island Police Station but while she did not question him, he made comments in her presence. She acknowledged that she did not conduct an interview with him. She did not know whether he was charged. No evidence was led that he was charged.

Failure to take account of relevant considerations

[39] The PSU argued that low ranking officers and officers in general must not be treated as government’s property to be tossed around at the PS’s or any other authority figure’s whim and fancy. It submitted that each employee regardless of rank within the service must be treated with respect and dignity. The PSU contended that the preamble of the Constitution states that ‘dignity of man is affirmed by Vincentians as principle to order their society.’ It submitted that inherent in this dignity is fair treatment and respect. It (PSU) drew on this principle to support its contention that the PS failed to act with due regard to the principles of natural justice.

[40] It argued further that Mr. Whyte’s circumstances called for the PS to act with due regard to openness, transparency and proper administration of the PSC’s and the Government of St. Vincent and the Grenadines’ business. The PSU maintained that the discretionary power afforded to the PS under CSO 2.17 cannot be engaged in an arbitrary and unfair manner which amounts to an abuse to the power. It concluded that the fact that public officers are liable to transfer does not mean that those with the discretionary power have been armed with unfettered authority.

[41] The PSU invited the court to consider the case of **Doody v. Secretary of State for the Home Department** in which Lord Mustill opined that 'fairness' is 'an insistence on greater openness, or ... 'transparency' in the making of administrative decisions.' The PSU noted that the Law Lord further stated:

'Fairness will very often require that a person who may be adversely affected by the decision will have an opportunity to make representations on his own behalf either before the decision is taken with a view to producing a favourable result, or after it is taken, with a view to procuring its modification, or both. Since the person affected usually cannot make worthwhile representations without knowing what factors may weigh against his interests fairness will very often require that he is informed of the gist of the case which he has to answer.'⁶

[42] The PSU argued that other peculiarities include Mr. Whyte's financial expenses; the geographic challenges including transportation issues which are beyond his control; uprooting Mr. Whyte and severely disrupting his family life and circumstances; the substantial financial cost to Mr. Whyte and how this would impact his ability to provide for himself and family; that the transfer was occasioned by the allegations of criminal investigations; and the fact that Mr. Whyte was employed with the Revenue Office Union Island for just about 10 years.

[43] The PSU contended that if the court is to accept, as reasonable and truthful, Mr. Pompey's testimony that he acted in 'the best interest of all parties,' and that he 'did not wish for Mr. Whyte to suffer any financial and pecuniary disadvantage under the circumstances', this must be reconciled with his evidence that he did not know the 'the personal circumstances to which Mr. Whyte speaks in his affidavit ... [because they] were not brought to [his] attention'; while admitting that he 'discreetly monitored the activities of Mr. Whyte through his supervisor.'

[44] The Union argued that the question that must come to the court's mind must be how could Mr. Pompey not be concerned about balancing Mr. Whyte's interests against that of the reputation of the public service. It reasoned that if he was really concerned about Mr. Whyte's well-being he would have found out or had some idea how his decision would affect his personal circumstances.

⁶ (1993) 3 All E.R. 92 at page 106.

The PSU submitted that the PS must have at least known the gross income and the statutory deduction from Mr. Whyte's salary. It argued that this was no ordinary transfer. It described the PS's actions as capricious, unjust and punitive.

- [45] The PSU observed that Mr. Pompey said a number of things under cross-examination which create difficulties for him. In this regard the Union noted that Mr. Pompey stated that it would not have been reasonable to consider Mr. Whyte's circumstances in arriving at his decision to transfer him; that his main concern were the reports from the police and the customs; that the decision was serious in regard to the Ministry, but not in relation to Mr. Whyte; that he was concerned about the public service's reputation; that the matter was transferred to the DPP and the PSC; and that the transfer was not disciplinary action.
- [46] The Union submitted that having brought the police and customs investigation to the PSC's attention, the matter was outside the PS's powers to act in the manner in which he did and that any first action with respect to Mr. Whyte in the circumstances, was the PSC's sole responsibility. I make the observation that this is an issue which does not require a determination from the court in arriving at a decision in the case at bar. It is therefore disregarded.
- [47] The PS and CPO submitted that Mr. Whyte's answers under cross-examination are important and should be noted. In this regard, they contended that Mr. Whyte admitted that the complaint against the PS is centred on the letter received on April 25th 2018 and signed by the PS; that at the material time Godfred Pompey was the administrative head in the Ministry of National Security; that Whyte's appointment letter governs the terms of his employment and states that he is liable to be transferred to any post of equivalent grade within the public service; that he is bound by the terms of this letter and that his salary remains undisturbed up to the present.
- [48] The PS and CPO pointed out that Mr. Whyte also accepted that he understood that he was being re-assigned as stated in the letter; that in his opinion, a transfer is permanent while a re-assignment is temporary; and that he has used the words 're-assign' and 'transfer' interchangeably in reference to the move from Union Island to the Maritime office. They submitted that he also acknowledged that he did not take up duties at the Maritime office; that his salary has not changed; and he is not in a position to say what duties he was to take up there; or whether it was to be the

same post. They pointed out that he also testified that he recorded all the reasons why he should not be transferred in the letter of the 26th April 2018.

- [49] The PS, CPO and PSC submitted that the issues to be determined are whether their actions were illegal, procedurally improper or unreasonable. They submitted further that Lord Diplock explained those terms in the case of **Council of Civil Service Unions v Minister for the Civil Service**⁷; where he stated:

‘By “illegality” ..., I mean that the decision-maker must understand correctly the law that regulates his decision-making power and must give effect to it. Whether he has or not par excellence is a justifiable question to be decided in the event of dispute by those persons, the judges, by whom the judicial power of the State is exercisable.

By “irrationality” I mean what by now can be succinctly referred to as Wednesbury unreasonableness (see *Associated Provincial Picture House Ltd v Wednesbury Corp* (1974) 2 AER p. 680). It applies to a decision which is so outrageous in its defiance of logic or of accepted moral standards that no sensible person who had applied his mind to the question to be decided could have arrived at it. Whether a decision falls within this category is a question that judges by their training and experience should be well-equipped to answer, or else there would be something badly wrong with our judicial system.’

- [50] As to procedural irregularity he was quoted as stating:

‘I have described the third head as (“procedural impropriety” rather than failure to observe basic rules of natural justice or failure to act with procedural fairness towards the person who will be affected by the decision. This is because susceptibility to judicial review under this head covers also failure by an administrative tribunal to observe procedural rules that are expressly laid down in the legislative instrument by which its jurisdiction is conferred, even where such failure does not involve any denial of natural justice.’

- [51] The learned authors of **Halsbury’s Laws of England** have opined that the duty to act fairly pervades the administrative decision making process unless expressly forbidden by statute or in

⁷ (1984) 3 AER 935.

cases where the interest affected is insignificant or remote. They expressed the view:

'the content of the duty will be assessed by reference to a wide range of factors including the nature of the individual's interest and the impact of the decision on it, the importance of the decision for the individual and for society, the type of decision being made, whether the decision is preliminary or final, the subject matter of the decision, and the terms of any relevant statutory provisions.'⁸

[52] They remarked that a duty to act in accordance with natural justice will arise when a decision 'directly affects any proprietary or personal right or interest including where the decision will affect a person's livelihood, legal status where that status is not merely terminable at pleasure, family or personal life, ... or another legitimate interest or expectation,...'⁸. They observed that 'by contrast, the conferring of a wide discretionary power exercisable in the public interest may be indicative of the absence of an obligation so to act.'⁸

[53] The learned authors provided other useful guidance by highlighting:

'Where a discretionary power to encroach on individual rights is exercised, factors to be taken into account in deciding what fairness requires in the exercise of the power include the nature of the interests to be affected, the circumstances in which the power falls to be exercised, and the nature of the sanctions, if any, involved. ... The application and scope of the duty must be determined having regard to all material circumstances.'⁸

[54] On the issue of relevant and irrelevant considerations, the learned authors noted:

'The exercise of such a power will be quashed where, on a proper construction of the relevant statute, the decision-maker has failed to take account of relevant considerations or has taken into account irrelevant considerations.'⁹ In some statutes, some or all of the relevant considerations may be express; where the statute is silent or the express considerations are not exhaustive, the courts will determine whether any particular

⁸ Halsbury's Laws of England, Volume 61A (2018) para. 31 (Lexis Nexis).

⁹ Associated Provincial Picture Houses Ltd v Wednesbury Corporation [1947] 2 ALL ER 680 at 682-683, CA, per Lord Greene MR.

consideration is relevant or irrelevant to the exercise of the discretion by reference to the implied objects of the statute.’¹⁰

[55] They noted further:

‘The question of whether something is a relevant consideration is one of law, but the weight to be given to any relevant consideration is a matter for the decision-maker, with which the court will only interfere on the grounds of **Wednesbury** irrationality...

What is or is not a relevant consideration in any case will depend on the statutory context. A public authority must have regard to matters material to its statutory obligation not to act in a way which is incompatible with human rights.’¹⁰

[56] The legal scholars observed further:

‘Fairness to persons affected by administrative action or personal hardship which may be caused thereby will also often be relevant consideration to be taken into account¹¹. In some contexts a decision-maker should have regard to the general public interest; while in others it may be inappropriate to do so. ...

If the decision-maker asks himself the wrong question, his error may lead him to take account of irrelevant matters or to disregard relevant matters so that his decision will be quashed.¹² Similarly, if a body fails to give an affected party a hearing before exercising discretion, contrary to the rules of natural justice or an obligation to consult that party, it may fail to take account of relevant material which could have been put forward by that party.¹³ A body empowered to exercise a discretion is under a duty to take reasonable

¹⁰ Halsbury’s Laws of England - Volume 61A (2018), para. 24.

¹¹ *Tameside Metropolitan District Council v Secretary of State for the Environment* [1984] JPL 180; *Westminster City Council v Great Portland Estates plc* [1985] AC 661 at 670 sub nom *Great Portland Estates plc v Westminster City Council* [1984] 3 ALL ER 744 at 750, HL per Lord Scarman.

¹² *Secretary of State for Education and Science v Tameside Metropolitan Borough Council* [1977] AC 1014 at 1052, HL, per Lord Wilberforce, at 1065 per Lord Diplock, and at 1072 per Lord Salmon.

¹³ *R v Secretary of State for Transport, ex p GLC* [1985] # All ER 300.

steps to acquaint itself with matters relevant to its decision, but the extent of its obligation to make inquiries and consider alternative courses of action will vary according to context.¹² ...

The exercise of a discretion will not be quashed for failure to have regard to a relevant matter or for taking account of an irrelevant matter where the court is satisfied that the relevant decision would have been the same¹⁴ had there been no error in the decision-making process.¹²

[57] In seeking to justify the impugned decisions it seemed, Mr. Pompey referred to allegations that Mr. Whyte refused to sign the attendance register while Mrs. Regisford Sam asserted that there were reports in 2015 about his delinquency and tardiness in relation to studies he was pursuing at the University of the West Indies. No attempt was made by Mr. Pompey or the CPO to link them to the decision to transfer Mr. Whyte or to aver that those reasons were disclosed to him as informing the transfer determination, if this transpired. I make no finding that either of them did. I turn to examine the law underpinning the decision to transfer and direct an officer to take compulsory leave

[58] Section 78 of the Constitution of Saint Vincent and the Grenadines¹⁵ vests authority in the PSC to 'appoint persons to hold or acting offices in the public service ...' The Public Service Commission (Delegation) Directions¹⁶ provides that certain of the PSC's powers are delegated to the relevant PS. In this regard, authority is delegated to the PS for appointment on transfer of officers in the clerical and minor salaried staff grades. This would apply to Mr. Whyte who is a clerical officer.

[59] The CSO are expressly stated to have been made under the authority of Cabinet and to have come into effect from 2nd February 1970. They do not indicate on their face, the fount of the Cabinet's authority for making them. It does not purport on its face to have legislative effect and contains no certification or endorsement to such effect.

¹⁴ R (on the application of Assura Pharmacy Ltd) v National Health Service Litigation Authority (Family Health Services Appeal Unit) [2008] ALL ER (D) 304 (Feb).

¹⁵ Cap. 10 of the Laws of Saint Vincent and the Grenadines, Revised Edition 2009.

¹⁶ Cap. 10 of the Laws of Saint Vincent and the Grenadines, Revised Edition 2009; paragraph 3.

- [60] The Constitution is silent on this subject. Section 52 of the Constitution provides that the Cabinet's functions are to 'advise the Governor-General in the Government of Saint Vincent and the Grenadines and be collectively responsible to the House for any advice given to the Governor-General by or under the general authority of the Cabinet and for all things done by or under the authority of any Minister in the execution of his office.'
- [61] This Court has stated elsewhere¹⁷ that the CSO is modelled on a set of rules (General Orders) which was used in former British colonies to circumscribe the administrative arrangements for the public service. In the textbook **Fundamental Rights in Commonwealth Caribbean Constitutions** the learned author Ms. Demerieux opined that General Orders 'are internal codes regulating discipline and conduct in the public service and do not constitute subsidiary or delegated legislation...'.¹⁸
- [62] This court noted that 'the General Orders referred to by Ms. Demerieux were rules made by the government administration (usually the Governor) in pre-independent British ruled colonies and associated states in the West Indies, pursuant to his executive authority derived from the monarch as Head of State and the civil service. In post-colonial jurisdictions, the General Orders have been largely replaced by rules fashioned in large measure on the General Orders described by Ms. Demerieux. In this jurisdiction, the CSO was made by the Cabinet to replace the General Orders.'
- [63] It was also observed that 'Cabinet is constituted by the Constitution and comprises the Prime Minister and the other ministers. The Attorney General will be a member of Cabinet where that office is filled by a public officer. The Cabinet performs an executive and advisory function and may make subsidiary legislation where authorized by law to do so. It has no inherent law making authority. When it makes subordinate laws the decree would contain reference to the enabling legislation.'

¹⁷ SVGHCV2016/0219 Public Service Union v Public Service Commission (unreported).

¹⁸ 1992, Margaret Demerieux, p. 292.

- [64] The Court had noted: 'Neither the Constitution nor the PSC Regulations empowered the Cabinet to create the CSO. The PSC ... pointed to no primary legislation which conferred authority on the Cabinet to constitute the CSO as a subsidiary enactment. There is nothing on their face or in them which signals that they are part of the body of laws in this state. I find therefore that they do not have the character of law.'¹⁸ I am of the considered opinion that the situation remains the same and therefore apply that determination to the facts of the case at bar.
- [65] In the premises, the Court is required to look at the underlying law, i.e. the Constitution and the PSC Regulations, neither of which set down any specific criteria which should inform the transfer of a public officer from one post to another whether within the same island or between islands. Guided by the learning outlined in **Halsbury's Laws of England** and the referenced cases, I note that the functions of the PSC and the parameters of the PSC Regulations deal exclusively with management and administration of the public service. The provisions cover matters such as appointment, promotion and discipline of public officers. Within the State, the government service straddles several islands. Therefore, in making appointments and transfers, it would be reasonable for the decision maker to have regard to the personal circumstances of the officers involved, such as their likely means, place of abode and family life arrangements, especially if the movement is across the seas. In-island transfers would for obvious reasons not need that in depth inquiry.
- [66] This would be particularly germane when a decision is likely to require a significant shift in any of those circumstances. Those considerations are so obvious that it was perhaps considered unnecessary to codify them in the Regulations. The learning is clear that they are relevant. I note that in the case at bar, Mr. Whyte contended that a move from Union Island to mainland Saint Vincent and the Grenadines would necessitate that he establish a home here; and that it would cause significant disruption to his personal and family life and his financial circumstances. This is to be expected unless he is a man of substantial means who owns or can afford to rent a residence in both locations and travel between the islands with minimum impact on his finances.
- [67] I am mindful that a change in residence from one locality to another invariably necessitates such adjustments and more so when the move is between islands and away from one's loved ones. I

daresay it is a significant life adjustment which would for most persons entail planning and making logistical arrangements over a period of time. Where family ties have been in place for years, other considerations are at play. Typically, a person planning such a move would need some time to finalize such plans and the amount of time will vary depending on the person's particular limitations and resources. I do not think that it is reasonable to expect someone to utilize his vacation for such purposes as appears to have been the thinking in the case at bar.

- [68] Mr. Pompey acknowledged that he did not take into account Mr. Whyte's family life or financial situation when he made the decision to transfer him and did not think that it was reasonable to do so. He indicated that he had regard only to the public interest, the public service's reputation, the reports from the police and the customs; and that the decision was serious in regard to the Ministry. He admitted that he realized that within his Ministry, there was no other suitable post on Union Island to transfer Mr. Whyte. He did not indicate whether there were other posts in other Ministries on the island. In the absence of a written decision or comprehensive reasons for the decision, this court is unable to assess whether that was an option that was considered or even available.
- [69] Mr. Pompey's admission that he did not factor in Mr. Whyte's circumstances is damning, considering that those are relevant, in light of Mr. Whyte's avowed particular interests and realistic concerns about his financial survival and in view of the detrimental effects it could have on his family life and general well-being. Without specifics about the nature of the investigations or criminal activity in which Mr. Whyte appears to have been implicated, the anticipated period for concluding those investigations; whether alternative posts of a similar nature to Mr. Whyte's were available on Union Island in other ministries; whether the PS consulted the CPO or the PSC about those if they existed; and what other options were available to address the perceived 'crisis' based on Mr. Whyte's particular familial circumstances, the court cannot conclude that the PS took into account all relevant considerations.
- [70] I am satisfied that Mr. Whyte's personal circumstances were a substantially relevant factor to be considered. The PS's failure to take them into account undoubtedly led to a flawed reasoning process which negatively impacted his decision-making and the outcome in an unfair manner. I find

that he did not take account of Mr. Whyte's family circumstances and this amounted to a failure to consider relevant factors in respect of the transfer. I am not persuaded that he would have arrived at the same decision if he had given consideration to those matters. It is just that the matter be referred to that adjudicator for a review.

[71] I am of the opinion that the decision to send Mr. Whyte on leave is not open to challenge in the same way. This is because of the alleged investigations allegedly concerned sensitive aspects of the State's operations. In those exceptional circumstances, Mr. Pompey probably had good reason to act expeditiously and have Mr. Whyte removed from operations to facilitate the progress of the ongoing investigations.

[72] I understand why Mr. Pompey would have requested that Mr. Whyte proceed on 8 days' vacation leave in the circumstances where as he claimed sensitive investigations were being undertaken. It can be appreciated that in such a case a prudent manager would need to act quickly to conduct damage control and implement other strategies out of the scrutiny of an alleged compromised employee. In the premises, Mr. Whyte would not have been unduly prejudiced by the reasonable need for him to be absent from work during such exercises. I make no finding that the PS took account of irrelevant matters in directing him to proceed on 8 days' vacation leave.

Reasonableness of decision

[73] I have no doubt that such a transfer would have a substantial impact on Mr. Whyte's family life including his relationship with his partner and child. It would have implications for how they arranged their daily routine. I accept Mr. Whyte's and Mr. Bailey's testimony that public officers are not normally transferred from the Grenadines to the mainland for duty unless they request a transfer or are promoted. In my opinion, a decision which would necessitate such a move should be founded on good and substantial reasons especially since this is an exceptional occurrence in the State. Mr. Pompey indicated that he gave Mr. Whyte a general idea why he was being transferred so precipitously, but due to security concerns could not elaborate.

[74] This is understandable in circumstances such as the instant case where investigations were

allegedly being conducted by the police and Customs, two arms of the State that are vested not only with investigatory, but also prosecutorial authority. Far be it for a PS to compromise such capacity and activities by exposing the strategy to an alleged suspect. The Court would not sanction such a proposition. I therefore accept that Mr. Pompey provided Mr. Whyte with adequate reasons for the transfer and related compulsory leave. I find too that his reasons for doing so cannot be successfully challenged. The PSU's claim that the decisions were unreasonable and effected without notifying Mr. Whyte of the underlying reasons is not made out.

Was the transfer unlawful?

- [75] The PSU contended that while a public officer is liable to be transferred under CSO 2.1, that the PS acted unlawfully when he transferred Jamali Whyte indefinitely to an unnamed post in the Maritime Department, without giving reasons for the transfer. It submitted that the PS's decision to transfer Mr. Whyte without indicating his post and for not indicating the period of transfer is arbitrary and unfair. It argued that the decision reflects poor administration, lack of transparency, openness and unfairness and is therefore unlawful in the circumstances. It cited in support of this submission, the decision in **Doody v Secretary for State of Home Department**¹⁹.
- [76] It submitted further that notwithstanding the PS's testimony that 'at all material times Mr. Whyte remained an employee of the Government of St. Vincent and the Grenadines...as a Clerk/Typist in Grade K';²⁰ and 'The post to which Mr. Whyte was being transferred was a Clerk/Typist'²¹; that the April 25th 2018 letter contained no details informing Mr. Whyte of his role and responsibility at the Maritime Department and for how long he would be there. The PSU reasoned that the period is indeterminate. It contended that the provision of this information is not to be taken for granted or withheld and further that information is key to accountability and helps to combat inefficiency.

¹⁹ (1993) 3 All ER 92.

²⁰ At. para15 of the affidavit of Godfred Pompey in response to the Fixed Date Claim Form, filed on 23rd July 2018 - page 97 of the trial bundle.

²¹ At. para12 of the affidavit of Godfred Pompey in response to the Fixed Date Claim Form, filed on 23rd July 2018 - page 96 of the trial bundle.

- [77] The PSU submitted that the PS did not give Mr. Whyte a reason or just cause for his transfer or re-assignment and further that no reason was articulated in the letter of April 25th, 2018. The PSU noted that the PS referenced 'information received from two separate sources' as a possible reason. It acknowledged that there is no statutory framework requiring any of the defendants to give reasons for a transfer/re-assignment; and argued that common law and natural justice principles support its case that reasons were to be provided.
- [78] The PSU submitted that just because the PS has the power to transfer a public officer under CSO 2.17 (1) (a), it does not mean that he has the liberty to abuse this discretion. It reasoned that such powers are not bestowed to enable the exercise of power arbitrarily, especially against low ranking public officers. It contended that discretion to transfer must be exercised reasonably, and that the PS failed in this regard, in the instant case.
- [79] The PSU argued further that the CSOs were published under the authority of Cabinet (the Executive) and took effect on the 2nd February 1970. It submitted that these rules do not supersede the Public Service Regulations²². It noted further that the subject of transfer is not particularized under Part 2 of the Regulations titled 'Appointments, Promotions and Transfers' and is therefore of no assistance to it (PSU).
- [80] The PSU accepted that there is no general or statutory duty to give reasons, but contended that as a principle of natural justice, there is a duty at common law to do so. It relied on **Halsbury's Laws of England** where the learned authors stated:
- 'Although it is still correct to say that there is no general duty, arising from requirements of procedural fairness, to give reasons for an administrative decision, in a substantial number of cases a duty to provide reasons has been found to exist on the particular facts of the case. In these cases the conclusion was that having regard to the nature of the interest concerned and the impact of the decision on that interest, and all other relevant considerations, a reasoned decision was required. Reasons may also be required if a

²² SRO 48 of 1969.

decision appears to be aberrant and requires explanation.'²³ (underlining added)

- [81] The PSU submitted further that the decision in the case of **R v The Universities Funding Council ex parte the Institute of Dental Surgery** is also instructive in this regard. They highlighted the pronouncement of Sedley J to the effect that:

'The giving of reasons may among other things concentrate the decision maker's mind on the right questions; demonstrate to the recipient that this is so; show that the issues have been conscientiously addressed and how the result has been reached; or alternatively alert the recipient to a justiciable flaw in the process. On the other side of the argument, it may place an undue burden on decision makers; demand an appearance of unanimity where there is diversity; call for the articulation of sometimes inexpressible value judgments; and offer an invitation to the captious to comb the reasons for previously unsuspected grounds of challenge.

It is the relationship of these and other material considerations to the nature of the particular decision which will determine whether or not fairness demands reasons.

In the light of such factors each case will come to rest between two poles, or possibly at one of them: the decision which cries out for reasons, and the decision for which reasons are entirely inapposite. Somewhere between the two poles comes the dividing line separating those cases in which the balance of factors calls for reasons from those where it does not.'²⁴

- [82] Sedley J was also quoted as follows:

'But we prefer the view that in the present state of the law there are two classes of case now emerging: those cases, such as Doddy, where the nature of the process itself calls in fairness for reasons to be given; and those, such as Cunningham, where (in the majority view) it is something peculiar to the decision which in fairness calls for reasons to be given.

²³ (2010) Vol. 61, 5th Ed. para. 647.

²⁴ [1993] EWHC QB 5 at pages 16 -17.

This does not mean that differing tests of fairness are to be applied; only that, as always, the requirements of fairness will vary with the process to which they are being applied.’²⁵

- [83] The PSU submitted that in view of the dicta from those cases, and in the absence of reasons for the PS’s decision, the court is now charged with considering whether fairness required him to give a reason for transferring Mr. Whyte. It contended that Mr. Whyte’s circumstance are peculiar and calls for reason to be given. It argued that the peculiar circumstances have to do with the fact that his transfer was on short notice and with immediate effect, after the eight days’ leave; based on his assertions that transfers from the Grenadines to Mainland, unless requested by public officers are an anomaly and do not qualify the officer for a hard area allowance.
- [84] The PSU contended that regulation 40 of the Public Service Regulations (‘PS Regulations’) provides the procedure for handling any report of criminal allegations or any report against Mr. Whyte. The Union noted that the PS Regulations provide for disciplinary proceedings to be initiated by the PSC or under the PS’s directions on the PSC’s instructions²⁶. It argued that the PS received no instructions or delegated responsibility from the PSC to act with respect to any allegations or report against Mr. Whyte.
- [85] The Union submitted that there is no evidence that the PS made a report, forthwith, to the PSC regarding the allegations made by the Police or Customs against Mr. Whyte. It argued that what is crystal clear is that the PS, the CPO and the PSC say that the PS informed the CPO and PSC of Mr. Whyte’s transfer. The Court notes that these are ancillary matters which the court is not required to make a pronouncement on in the present proceedings. They are therefore not entertained.
- [86] The PSU contended further that the PS acted precipitously, unreasonably, arbitrarily, without the PSC’s instructions and without just cause. It argued that a reasonable-minded Permanent Secretary or authority would have realized that, in the circumstances, the best course of action was to wait on the PSC’s response. The Union submitted that if the allegations against Mr. Whyte were

²⁵ At pages 17 -18.

²⁶ PS Regulation 40(2).

of any merit; and if the court is to believe that the public service's reputation was on the line because of Mr. Whyte's action, then the first course of action lay with the PSC and not the PS.

- [87] The Union submitted further that if the PS truly believed that the 'sensitive reports' were so grave with respect to the 'best interest of the Revenue Office and for the exigencies of the public service', then the PSC could have engaged regulation 44 and suspended Mr. Whyte. Regulation 44 provides:

'where the Commission becomes aware of any act of indiscipline or misconduct, and the Commission is of the opinion that it would be in the public interest, having regard to the reputation of the public service, to do so, the Commission may direct in writing that the officer concerned will cease to report to duty until further notice from the Commission and an officer so directed shall cease to perform the functions of his office forthwith.'

- [88] The PSU submitted that the evidence strongly indicates that Mr. Whyte was being disciplined by transfer. It directed the court's attention to the language used by Mr. Pompey when describing his interaction with Mr. Whyte and his treatment him notably: 'His conduct and the activities in which it was alleged he was engaged if true were not in keeping with that of a public officer...; 'no other suitable position... under my control... which would not conflict with the alleged activities reported to me by various authorities'; and 'I have had the benefit of several official reports which give testament to the ongoing investigation.'

- [89] The PSU argued that those words and language suggest that the PS believed that some action was warranted for alleged wrongdoing and that he decided it was to transfer Mr. Whyte. It contended that transfer is not an established disciplinary charge under regulation 50 and in any case, the PS acted without the PSC's instructions and without just case. It reasoned that the PS's decision swells with unfairness and illegality; his action was peremptory, and Mr. Whyte was punished in a high-handed manner. It concluded that contrary to the PS's estimation, Mr. Whyte's transfer was not properly effected and was not within the best interest of the public service.

- [90] The foregoing submissions suggest that Mr. Whyte's transfer should be viewed as some action under Regulation 40 (2), which is equivalent to initiation of disciplinary proceedings. Alternatively, the submissions presuppose that a PS or CPO is prohibited from transferring a public officer who is or is likely to be the subject of disciplinary investigations under the PS Regulations; or who is or is

likely to be subject of criminal investigations or proceedings. The Union has advanced no legal authority for that perspective. None is contained in Regulation 40 (2) or elsewhere.

[91] The PS, CPO and PSC contended that the PS told Mr. Whyte that he could no longer have him working in the Union Island Revenue Office based on information received about his attitude and behaviour at work, along with activities in which he was involved in Union Island. They noted that the letter purporting to re-assign him also made reference to that conversation. They argued that in all circumstances Mr. Whyte was well apprised of the reasons for his transfer and that there was just cause for it.

[92] They added that there is no requirement to give a reason, but notwithstanding Mr. Whyte was granted an audience with the PS directly and was told why he was being transferred, as far as reason would allow. They contended that the reason was given orally and the conversation was referenced in the letter dated 25th day of April 2018. They submitted that by his letter dated 26th day of April 2018, Mr. Whyte acknowledged that the PS provided a reason, where he stated:

‘Mr. Pompey replied stating that based on my attitude and behavior along with activities I am involved in on Union Island that he can no longer have me working at the Union Island Revenue Office.’²⁷

[93] The PS, CPO and PSC submitted that Mr. Whyte’s transfer/re-assignment Mr. Whyte to the Maritime Administration is perfectly within the four corners of the law and is not illegal as alleged. They argued that the PS is empowered by CSO 2.17(1) (a) to effect such an intra-ministerial transfer.

[94] The PSU’s contention that the transfer is unlawful contains the following elements: no reasons were provided for the decision; the transfer was not expressly made to a named post; and that it therefore did not comply with the letter and spirit of the law. I have already dealt with the lack of reasons contention. I wish to briefly highlight some relevant guidance which is instructive before touching on the ‘transfer to an un-named post.

[95] The authors of **Halsbury’s Laws of England** have observed that there is sometimes a statutory

²⁷ See copy of letter at page 136 of the trial bundle.

duty for a decision-maker to give reasons and in those instances, the reasons given must be adequate, intelligible and deal with the substantial points at issue. They noted that where there is no such statutory obligation, the courts are becoming more willing to conclude that decision-makers are required to do so as a matter of natural justice.²⁸

- [96] The learned authors remarked that 'In a statutory context, the common law principle of fairness often provides the basis for the duty applying as the giving of reasons is essential to allow effective supervision by the courts. In a series of cases the courts have concluded that, having regard to the nature of the interest concerned and the impact of the decision on that interest, and all other relevant considerations, a reasoned decision was required. Reasons may also be required if a decision appears to be aberrant and requires explanation. The widening scope of the exceptions to the default 'no reasons' position has led the courts to suggest that the common law is moving to the position where, whilst there is no universal obligation to give reasons in all circumstances, in general, they should be given unless there is a proper justification for not doing so.'²⁹

Transfer to un-named post

- [97] The CPO and PS have pointed out that it is usual that lateral transfers do not contain the specifics of the post to which the officer is being transferred. I accept their explanation. I therefore find that the transfer was not unlawful.

Issue 2 - Whether the decision by the CPO and PSC respectively not to afford Mr. Whyte an opportunity to be heard was unfair, unjust and/or unlawful?

- [98] The PSU submitted that the CPO and PSC acted unlawfully, unjustly and or unfairly by denying Mr. Whyte a right to be heard. The PSU pointed out that they admitted receiving the letters sent to them and that neither Mr. Whyte nor the PSU was given a hearing with respect to the PS's actions. The PSU argued that they acknowledged that the letters requested an urgent meeting to resolve

²⁸ Halsbury's Laws of England, Volume 61A (2018) para. 45 (Lexis Nexis).

²⁹ Halsbury's Laws of England, Volume 61A (2018) para. 48 (Lexis Nexis).

the concerns yet seemed 'unmoved' to provide an opportunity to hear it. It submitted that neither the CPO nor PSC testified that something was being done to accommodate them. It argued that they (CPO and PSC) either simply ignored and/or refused to apply the proper procedures under PSC Regulations 40.

[99] The PSU contended that the court must not accept the PSC's evidence that there was no breathing space to allow for the ventilation of the matter or for a request for a report from Mr. Whyte. It submitted that neither the CPO nor the PSC produced any evidence to persuade the court that it was impractical and reasonably challenging to dealing with the PSU fairly. It pointed out that the PSC³⁰ admitted under cross examination that no response was issued to them within the 5 weeks from April 26th 2018 when the PSC met and June 6th 2018 when the PSU filed its claim. The PSU submitted that the CPO and PSC had ample time to address its concern but refused to do so.

[100] The PSU contended that the dismissive action by the CPO and PSC were deliberate, unlawful, unjust and illegal. It argued that the circumstances were serious, and that the PSC especially had a duty to hear the PSU and Mr. Whyte. It contended that the PSC had no justification for refusing and/or failing to give the PSU a hearing. It noted that the PSC's evidence was that it was not able to meet to discuss the matter before the court proceedings were commenced, even though 5 weeks have passed before the PSU filed a claim.

[101] It observed that the PSC's chairman did not say why the PSC could not meet during that time. The PSU argued that a meeting was not even necessary because the PSC could invoke regulation 6 of the PSC Regulations and circulate papers to members for their feedback in writing. The PSU argued that not even the fixed date claim moved the CPO and PSC to act with any sense of responsibility and duty.

[102] The PSU contended that the evidence strongly suggests that the CPO and PSC believed that it was not necessary to do anything; whether to grant a hearing; or to drop a few lines acknowledging receipt of at least one of the letters. It argued that both defendants have exhibited a scant regard for the Regulations, natural justice and the proper functioning of the PSC, and have therefore acted

³⁰ Presumably the PSC Chairman.

unlawfully, unjustly and unfairly by denying Mr. Whyte a right to a hearing. It concluded that the circumstances demanded fairness; as articulated in the **Doody** judgment; and quoted earlier.

- [103] The CPO and PSC countered that CSO 2.17(2) provides that Mr. Whyte was permitted to lodge a written objection himself, with the CPO. They submitted that Mr. Whyte has therefore not conformed to the letter of the provision. They submitted that the CPO gave evidence on cross-examination that she never received the referenced letter. They contended that Mr. Whyte himself could not assist in terms of to whom it was delivered and stated on cross-examination, that he could not recall where he delivered it.
- [104] They contended further that the CPO does not deny receiving the other correspondence and ought to be taken as a witness of truth. They conceded that if the court is minded to accept that the letter from the PSU spoke to the spirit intended by the provision which was to bring notice to the CPO or PSC then, arguably, that was done in substance if not in form. They contended that the evidence from the CPO and the PSC gives a clear time line, showing that 5 weeks passed between the PSC's meeting and the filing of the matter.
- [105] They argued that the earliest letter, at best the 26th day of April 26, and the subsequent letters of the 30th day of April 2018 through the 14th day of May 2018, were prior to the PSC's next meeting. They reasoned that the PSC was not afforded an opportunity to act prior to the 6th day of June 2018 when the court became seized of the matter. They reasoned that the CPO's and PSC's actions were not illegal, irrational or procedurally improper in the circumstances.
- [106] It is not in dispute that the PS acted quickly to have Mr. Whyte transferred from Union Island to the mainland. In those circumstances, Mr. Whyte was given 8 days to put his affairs in order. If he was to be successful in getting a suspension or reversal of the transfer decision, the next level managers or authority had to act almost as quickly. It cannot be gainsaid that timing was therefore critical.
- [107] In the **Doody case**, the House of Lords was considering an appeal from a number of persons who had been convicted of murder and who were contending that they were entitled to know the

reasons why the Home Secretary had departed from recommendations by the judiciary as the period the prisoner should serve for the purposes of retribution and deterrence. The House of Lords agreed with the prisoners and determined that they should also be granted an opportunity to make representations before a final determination was made by the Home Secretary.

[108] In his judgment Lord Mustill addressed his mind to what fairness entailed in those circumstances. He stated:

‘What does fairness require in the present case? ... I think it unnecessary to refer by name or to quote from, any of the often-cited authorities in which the courts have explained what is essentially an intuitive judgment. They are far too well known. From them, I derive that (1) where an Act of Parliament confers an administrative power there is a presumption that it will be exercised in a manner which is fair in all the circumstances. (2) The standards of fairness are not immutable. They may change with the passage of time, both in the general and in their application to decisions of a particular type. (3) The principles of fairness are not to be applied by rote identically in every situation. What fairness demands is dependent on the context of the decision, and this is to be taken into account in all its aspects. (4) An essential feature of the context is the statute which creates the discretion, as regards both its language and the shape of the legal and administrative system within which the decision is taken. (5) Fairness will very often require that a person who may be adversely affected by the decision will have an opportunity to make representations on his own behalf either before the decision is taken with a view to producing a favourable result; or after it is taken, with a view to procuring its modification; or both. (6) Since the person affected usually cannot make worthwhile representations without knowing what factors may weigh against his interests fairness will very often require that he is informed of the gist of the case which he has to answer.’³¹

[109] On the specific issue of whether the prisoner was entitled to be provided with reasons for the Home Secretary’s departure from judicial recommendations, Lord Mustill noted that under the present

³¹ [1993] 3 WLR 154 at pg. 168.

arrangement the Home Secretary made his decision and communicated it to the prisoner without input from the latter. He remarked:

‘My Lords, I am not aware that there still exists anywhere else in the penal system a procedure remotely resembling this. ... I doubt whether in the modern climate of administrative law such an entirely secret process could be justified. As I hope to have shown, however, this is no longer the practice, and can hardly be sustained any longer as the theory. I therefore simply ask, is it fair that the mandatory life prisoner should be wholly deprived of the information which all other prisoners receive as a matter of course. I am clearly of the opinion that it is not.’ (underlining added)

- [110] The referenced legal authorities have demonstrated that developments in the common law are increasingly eschewing earlier practices of failing to seek and consider representations by the persons being affected by administrative decisions, particularly where the consequences will have a significant impact on the affected person’s life. The essence of fairness recognizes and treats persons as valuable beings with worth, dignity and the inherent right to have a say in their fate and not to be treated as inanimate, valueless objects. Regrettably, Mr. Whyte was not afforded this opportunity.
- [111] Undoubtedly, the door should have been kept open even after the fixed date claim was filed and steps could in my opinion have been taken to engage him or his representative or agent, the PSU. Sadly, it seems this was not done. Judicial review claims may be mediated or be made the subject of alternative dispute mechanisms. It is regrettable that the parties did not consider that approach in the instant case.
- [112] The court is mindful that it is arguable that the **Doody case** is distinguishable from the one at bar by the subject matter (one relating to penalty in a criminal court setting and the other to purely public administrative concerns). The general principles while not being of universal application in every instance provide guidance on the approach which this court should adopt. I am satisfied that in all the circumstances Mr. Whyte’s world would be impacted in fundamental ways by the decision made to transfer him, and he therefore should have been afforded an opportunity to make representations to inform the process.

[113] The CPO's and PSC's failure to entertain his request for an audience was not the correct approach, even after the claim was filed. The PSC has offered no compelling reason why an extra-ordinary meeting was not convened. I see no reason why they did not respond to his and the PSU's requests. Their stance was unfair, unlawful (being contrary to the basic dictates of natural justice and constituted a procedurally improper response.

[114] It is also important to make the point again that the CSO is not a piece of legislation and therefore does not have the force of law. It cannot trump established administrative law principles. In any event, even if it had the character of law, the principles of natural justice would still be applicable in interpreting and applying its provisions. An opportunity to be heard is one of the cornerstones of a fair and transparent decision-making process. For the foregoing reasons and in congruence with the referenced legal principles, I find that the CPO and the PSC failed to grant Mr. Whyte and the PSU that opportunity and further that this failure amounted to a procedurally improper, unjust and unfair decision.

Issue 3 - Whether the PSC acted unlawfully or procedurally improper by failing or refusing to state the public interest basis for forcing the claimant to proceed on compulsory leave?

[115] In framing this allegation, the PSU made itself the subject of the determination sought. They made no application to amend the pleadings. There is no evidential or legal basis on which to find that the PSC was forced to go on compulsory leave. I dismiss this limb of their claim.

Issue 4 – To what, remedies if any, is the claimant entitled?

Declaration and Certiorari

[116] The PSU sought declaratory relief on more than one score and an order of certiorari. A decision as to whether to grant declaratory relief must take into account all material circumstances including the defendant's conduct and its effect. I am satisfied that the circumstances in this case is fertile ground in which to plant seeds of good practice in public administration by way of declaration. The parties would be the ultimate beneficiaries, with perhaps some cross-fertilisation within the public service.

[117] For the foregoing reasons, it is declared that the Permanent Secretary's decision to direct Mr. Whyte to proceed on 8 days' vacation leave was not unreasonable or unlawful or arrived at in a procedurally improper manner. However, his decision to transfer Mr. Whyte was arrived at in a procedurally improper manner and is quashed. The PSC did not act unlawfully or procedurally improper by failing or refusing to state the public interest basis for forcing the claimant to take compulsory leave. Finally, the decision by the CPO and the PSC not to afford Mr. Whyte an opportunity to be heard on the decision to transfer him to the Maritime Department, Cruise Ship terminal in Saint Vincent was unjust, unfair, unlawful and arrived at in a procedurally improper manner. That matter is remitted to the PS for determination in accordance with the law.

Issue 4 - To what, remedies if any, is the PSU entitled?

[118] The interests of this case can best be served by granting one of the declarations prayed for and referring the matter to the PS to provide substantive reasons for his decisions and to enable the CPO and PSC to entertain the requests by the PSU and Mr. Whyte for an opportunity to be heard on the transfer.

ORDER

[119] It is accordingly declared and ordered:

1. The Permanent Secretary's decision to direct Mr. Whyte to proceed on 8 days' vacation leave was not unreasonable or unlawful or arrived at in a procedurally improper manner.
2. The PSC did not act unlawfully or procedurally improper by failing or refusing to state the public interest basis for forcing the claimant to take compulsory leave.
3. The Permanent Secretary's decision to transfer Mr. Whyte was arrived at in a procedurally improper manner and is hereby quashed.
4. The decision by the Chief Personnel Officer and the Public Service Commission not to afford Mr. Whyte an opportunity to be heard on the decision to transfer him to the Maritime Department, Cruise Ship terminal in Saint Vincent was unjust, unfair, unlawful and arrived at in a procedurally improper manner.

5. The issue of whether Mr. Whyte is to be transferred to the Maritime Department, Cruise Ship terminal is remitted to the Permanent Secretary in the Ministry of National Security for determination in accordance with the law.
6. The Public Service Commission shall pay to the Public Service Union costs to be assessed if not agreed. The Public Service Union shall file and serve on or before 30th May, 2020 an application for assessed costs pursuant to CPR 56.13.

[120] The court extends thanks to the legal practitioners for their written submissions.

Esco L. Henry
HIGH COURT JUDGE

By the Court

Registrar